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Penalty Clauses in Testaments: What Louisiana Can Learn from the Common Law

“With trepidation I approach the ‘*in terrorem*’ doctrine, because of the confusion of thought evidenced in the many reported cases and published discussions.”¹

I. INTRODUCTION

During the last days of Bob’s life, his mind showed significant deterioration. Abby, his assistant and bookkeeper, helped Bob update his will six days before he died. The amended testament assigned twenty-five percent of the estate to Abby—an addition that had not been included in the previous version of Bob’s will. Bob signed the updated document in the presence of two witnesses, both of whom were related to Abby. After Bob’s death, his only daughter, Debbie, initiated proceedings to attack the will, alleging undue influence. In response, Abby asked the court to enforce a special provision contained in the testament that read, “If any legatee under this Will in any manner whatsoever contests or attacks this Will, any bequest I have made to that person under this Will is revoked and shall be disposed of as if that contesting beneficiary had predeceased me.

The peculiar provision in Bob’s will is a typical example of an *in terrorem* clause. These clauses, also called penalty, forfeiture, or no-contest clauses, are designed to prevent a legatee from contesting a will in court at the risk of forfeiture of his legacy.² The Latin phrase “*in terrorem*” means “into fear.”³ Indeed, the clauses inflict fear not only upon the heirs but, as will be demonstrated, upon legal practitioners and courts as well.⁴ The chief difficulty for the courts arises out of the need to balance the right of testators to

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1. Moskowitz v. Federman, 51 N.E.2d 48, 54 (Ohio Ct. App. 1943).

2. *In terrorem* clauses in the broad sense encompass penalties for non-compliance with other conditions, for instance, “refraining from smoking, marrying within a religion, or not marrying someone of another religion, or any other condition, rather than simply not challenging a will.” Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 629 n.2 (1994). Most of the time the terms “*in terrorem*,” “penalty,” and “no-contest” are used interchangeably to signify the prohibition against will contests. *Id.* This Comment will utilize the terms “*in terrorem*” and “penalty” in their narrow meaning as synonyms to “no-contest.”

3. “[I]n *terrorem* . . . [Latin ‘in order to frighten’] [b]y way of threat; as a warning.” BLACK’S LAW DICTIONARY 839 (8th ed. 2004).

4. See, e.g., discussion *infra* Part III (reflecting the confused state of Louisiana jurisprudence).

freely dispose of their estate against the heirs' right to pursue their meritorious claims.⁵ To make matters worse, testators can be extremely creative in their phraseology of penalty clauses.⁶ The judicial analysis necessarily depends on the language of the clause itself and the circumstances surrounding the contest, which makes the courts' task even more arduous.⁷

The difficulty in balancing the rights of testators and the rights of heirs is exacerbated in Louisiana. Few cases involving penalty clauses arose during the twentieth century, leaving Louisiana courts without the opportunity to develop a systematic approach to analyzing penalty clauses.⁸ Changes in Louisiana successions law have increased the likelihood that testators will resort to such clauses and that litigation regarding them will ensue. Due to the virtual abolition of forced heirship, a testator has more freedom in

5. See discussion *infra* Part V.C.

6. Wood Brown, *Provisions Forbidding Attack in a Will*, 4 TUL. L. REV. 421, 422 (1930) ("[T]he variations [on conditions] are limited in number only by the limitations of human ingenuity.").

Sample clauses vary from the traditional type used by Bob to the specific and more creative ones like examples that follow.

In the event that a beneficiary of any of the trust assets contests the validity of any provision of the Settlor's Will, any trusts which the Settlor or the Settlor's spouse have created, or any transfers to this trust or the trust for the Settlor's spouse, such beneficiary shall lose all of his or her right to any and all interests he or she may have from the Settlor's Will and any trusts which the Settlor or the Settlor's spouse have created. The person who has "contested" shall be deemed to have predeceased me.

Ackerman v. Genevieve Ackerman Family Trust, 908 A.2d 1200, 1201 (D.C. 2006).

Should my wife, Ymelda contest any provision of this trust or my will for any reason whatsoever, or seek to obtain more than 46% of the stock of Alacer now in the name of this trust, by whatever means including seeking the order of any court to determine her community property interest or confirm as community property to her a shareholder interest greater than that I have provided, I direct that she shall receive nothing.

Patrick v. Turner, No. G037607, 2008 WL 4650403, at *2 (Cal. Ct. App. Oct. 22, 2008). See discussion *infra* Part III for the phraseology of various clauses analyzed by Louisiana courts.

7. Olin L. Browder, Jr., *Testamentary Conditions Against Contest Re-Examined*, 49 COLUM. L. REV. 320, 321 (1949).

8. Succession of Rouse, 80 So. 229 (La. 1918); Hoggatt v. Gibbs, 12 La. Ann. 770 (La. 1857); *In re* Succession of Scott, 950 So. 2d 846 (La. App. 1st Cir. 2006), writ denied, 948 So. 2d 176 (La. 2007); Succession of Wagner, 431 So. 2d 10 (La. App. 4th Cir. 1983); Succession of Rosenthal, 369 So. 2d 166, 178 (La. App. 4th Cir. 1979), writ denied, 371 So. 2d 1345 (La. 1979); Succession of Gardiner, 366 So. 2d 1065 (La. App. 3d Cir. 1979), writ denied, 369 So. 2d 154 (La. 1979); Hughes v. Burguières, 258 So. 2d 626 (La. App. 1st Cir. 1972), *aff'd in part*, 276 So. 2d 267 (La. 1973); Succession of Kern, 252 So. 2d 507 (La. App. 4th Cir. 1971), writ refused, 254 So. 2d 462 (La. 1971).

determining how to dispose of his estate.⁹ This increased freedom may prompt testators to resort to penalty provisions as a guarantee that their wills are enforced.¹⁰ With limited exceptions, the estate is now “freely alienable,” which allows testators to be creative in their bequests.¹¹ At the same time, descendants of testators who are left out of the will are more likely to file suit challenging the will because, save in rare circumstances, they are no longer entitled to a portion of the testator’s estate by law.

This likely increase in the use and litigation of penalty clauses necessitates the clarity that this Comment strives to provide by proposing a framework for analyzing penalty clauses in Louisiana. Part II presents the background of penalty provisions in Roman and French history. Part III reviews and summarizes the trends in more than one hundred years of Louisiana jurisprudence, while at the same time identifying the gaps in courts’ analysis. Part IV examines the history and modern common law in search of the solution for Louisiana’s problems. Part V establishes a flexible framework for analyzing penalty provisions in Louisiana that combines Louisiana’s civil law heritage with the equitable common law approach. Part VI offers a brief conclusion.

II. BACKGROUND

The statutory authority for analyzing penalty clauses in Louisiana is Louisiana Civil Code article 1519, which provides that “[i]n all dispositions *inter vivos* and *mortis causa* impossible conditions, those which are contrary to the laws or to morals, are reputed not written.”¹² Louisiana jurisprudence has used French

9. In 1996, the legislature limited forced heirship to “children who are less than twenty-four years of age at the time of the decedent’s death, or children of any age who are permanently disabled at the time of the decedent’s death.” Kerry J. Miller, *The New Forced Heirship Law, Its Implementing Legislation, and Major Substantive Policy Changes of the Louisiana State Law Institute’s Proposed Comprehensive Revision of the Successions and Donations Laws*, 71 TUL. L. REV. 223, 223 (1996).

10. Louisiana jurisprudence is clear that a penalty clause infringing upon the forced heir’s legitime is void as contrary to the law and public morals. *See, e.g., Hoggatt*, 12 La. Ann. at 770 (stating that the penalty clause depriving the daughter of her forced portion was contrary to the law); *Kern*, 252 So. 2d at 510 (“[T]here would be little problem [with the enforcement of the clause] in the absence of forced heirs”).

11. Miller, *supra* note 9, at 226.

12. LA. CIV. CODE art. 1519 (2008); *see, e.g., Gardiner*, 366 So. 2d at 1067–68 (citing LEONARD OPPENHEIM, SUCCESSIONS AND DONATIONS § 129, *in* 10 LOUISIANA CIVIL LAW TREATISE 254 (1973); AUBRY & RAU, DROIT CIVIL FRANÇAIS § 692, at 295 (Carlos Lazarus trans., 1969); Brown, *supra* note 6, at 421) (“Commentators have stated that the governing statutory provision is LSA-

law as a framework for determining the validity of the underlying disposition, which in turn finds its roots in Roman law.¹³ Thus, a brief examination of the law in those jurisdictions is required.

A. Roman Law: The Birth of the Modern Civil Law Approach

Most civilian legal systems contain a statute similar to Louisiana's article 1519.¹⁴ This general civil law principle dates back to Roman law.¹⁵ The practice of considering illicit and immoral conditions not written might have been caused by the desire to preserve the testament despite the failure of a condition

C.C. Article 1519 . . .). Some Louisiana sources claim that article 1519 is taken directly from the Code Napoleon. *Gardiner*, 366 So. 2d at 1067–68; see FREDERICK WILLIAM SWAIM, JR. & KATHRYN VENTURATOS LORIO, SUCCESSIONS AND DONATIONS § 12.3, in 10 LOUISIANA CIVIL LAW TREATISE 297 (1995) (“Code Napoleon Article 900 is the counterpart of Louisiana Article 1519.”).

There is a long-standing controversy over the historical origins of the 1808 Louisiana Digest, specifically, whether its roots are French or Spanish. See, e.g., Vernon Palmer, *The French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 LA. L. REV. 1067 (2003); Vernon Palmer, *The Recent Discovery of Moreau Lislet's System of Omissions and Its Importance to the Debate over the Sources of the Digest of 1808*, 49 LOY. L. REV. 301, 301 n.2 (2003) (citing the following sources on the French–Spanish debate: Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628 (1972); Robert Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972); Thomas Tucker, *Interpretation of the Louisiana Civil Codes 1808–1840: The Failure of the Preliminary Title*, 19 TUL. EUR. & CIV. L.F. 57 (2004); John Cairns, *The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An Historical Study of Legal Change* (1980) (unpublished Ph.D. dissertation, Edinburgh University) (on file with Tulane Law Library)).

This Comment does not attempt to resolve the controversy over the origins of article 1519. The language of the French and Spanish articles is virtually identical, and the actual source of the Louisiana article is unlikely to have practical implications in this context. Compare the language of the French article (“In any inter vivos or testamentary disposition, impossible conditions or those which are contrary to laws or to morals are considered not written.” THE FRENCH CIVIL CODE 187 (John N. Crabb trans., Fred. B. Rothman & Co. ed., 1977) (translating CODE CIVIL [C. CIV.] art. 900 (Fr.)) with its Spanish counterpart (“Impossible conditions and those contrary to law or good morals shall be considered as not imposed and shall not prejudice the heir or legatee in any manner whatsoever, even when the testator disposes otherwise.” Brown, *supra* note 6, at 422 n.2 (translating CÓDIGO CIVIL [C.C.] art. 792 (1888) (Spain)).

13. SWAIM & LORIO, *supra* note 12, § 12.5, at 297.

14. Brown, *supra* note 6, at 421.

15. See generally Brown, *supra* note 6 (providing a survey of different versions of this rule adopted in civil law jurisdictions).

because “the Romans dreaded dying intestate.”¹⁶ The Romans resorted to various measures to ensure that a testament would be preserved despite the annulment of a condition.¹⁷ For instance, if the legatee took an oath to abide by the condition imposed by the testator, the praetor could grant the legatee a release from such an oath if the condition was illicit or immoral.¹⁸ Another solution was to regard the impossible conditions as “inadvertent,” implying that the testator would not have purposely added a condition that might cause his intestacy.¹⁹

Although there is no consensus as to the consequence the Romans attached to impossible or immoral conditions, two schools of thought can be identified: Proculians and Sabinians.²⁰ One of the differences in methodology employed by the two schools is related to textual interpretation.²¹ In reviewing contracts and wills, Proculians “advocated a strict, objective interpretation of the words used, whatever may have been the intention of the author of the text and often without regard to the consequences.”²² Proculians looked at “the objective agreement of the parties, as expressed in the formulation of the contract.”²³ Following the rule applicable to contracts, Proculians would annul the whole legacy if the condition contained therein was determined to be contrary to the law or public policy.²⁴ On the other hand, Sabinians “favored a looser and less rigid approach to the interpretation of texts.”²⁵ In interpreting

16. AUBRY & RAU, *supra* note 12, § 692, at 286 n.2; *see also* SWAIM & LORIO, *supra* note 12, § 12.3, at 297 (describing devices utilized “to avoid the Roman disgrace of dying without an instituted heir”). *But see* Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT’L L. 41, 42 n.5 (2008) (citing varying views on the attitude of the Romans to intestacy).

17. SWAIM & LORIO, *supra* note 12, § 12.3, at 297.

18. *Id.* In Rome, the praetor was responsible for the administration of justice. *See generally* WILLIAM ALEXANDER HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW IN THE ORDER OF A CODE 34 (4th ed. 1903).

19. SWAIM & LORIO, *supra* note 12, § 12.3, at 297.

20. Brown, *supra* note 6, at 422 n.2 (citing WILLIAM WARWICK BUCKLAND, TEXTBOOK OF ROMAN LAW 336 (1921); 1 HENRY JOHN ROBY, ROMAN PRIVATE LAW § 5, at 317 (1902)). *But see* HANS JULIUS WOLFF, ROMAN LAW: A HISTORICAL INTRODUCTION 105–06 (4th ed. 1978) (providing a discussion of the origins of the two schools and noting that “all attempts to attribute to these schools definite contrasting attitudes concerning basic principles of law or philosophy have failed”).

21. Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. 1539, 1545 (1995).

22. *Id.*

23. *Id.* at 1546.

24. Brown, *supra* note 6, at 422 n.2.

25. Stein, *supra* note 21, at 1546.

wills, Sabinians were concerned with ascertaining the intent of the testator, without dwelling on the objective meaning of the will's language.²⁶ Thus, Sabinians are considered to be the founders of the modern-day civilian approach of preserving the legacy as a whole after striking down the illicit or immoral condition.²⁷

B. French Law: Focus on the Underlying Disposition

The Sabinian approach has been carried on in France, where penalty clauses ordinarily are regarded as valid, and their enforcement results in the heir forfeiting his bequest.²⁸ The validity and enforceability of a particular penalty clause hinge upon the success of the heir's contest of the underlying disposition.²⁹ If the contestant fails to show that the disposition is illegal or immoral, the penalty clause becomes enforceable, and the heir will forfeit the bequest.³⁰ On the other hand, if the contestant succeeds in demonstrating that the disposition is contrary to the law or good morals, the penalty clause will be deemed unwritten, and the contestant will not be punished.³¹ The contestant is not allowed any leeway for challenging the will in good faith.³² As justification for this unsympathetic approach, French commentators note that "there is nothing more worthy than the wish of the testator to prevent wrangling in the courts among his heirs" and that strict enforcement of penalty provisions is bound to make the heirs think twice before attacking the will.³³ Nonetheless, the harshness of this approach is apparent, for "no one can be sure that a disposition is actually against law or morals until the court has decided the point."³⁴

26. *Id.* at 1547.

27. Brown, *supra* note 6, at 422 n.2; see also SWAIM & LORIO, *supra* note 12, § 12.3, at 296 (citing MARCEL PLANIOL, 3 TRAITE ÉLEMENTAIRE DE DROIT CIVIL 481-82 (La. State Law Inst. trans., 1959) (1938); Comment, *Impossible Conditions in Roman and Modern Law: Summary Review*, 16 TUL. L. REV. 433, 433-34 (1942)) (discussing the difference in approaches of the two Roman schools).

28. AUBRY & RAU, *supra* note 12, § 692, at 296. At some point French law considered penalty clauses *contra bonos mores* because they deprived individuals of their access to courts. Brown, *supra* note 6, at 423.

29. Brown, *supra* note 6, at 423-24.

30. *Id.* at 424.

31. C. CIV. art. 900 (Fr.) (1804).

32. Brown, *supra* note 6, at 424.

33. *Id.* at 424-25 (citing RAYMOND THÉODORE TROPLONG, DES DONATIONS ENTRE-VIFS ET DES TESTAMENTS § 265, at 341 (1855)).

34. *Id.*

In their analysis, French courts distinguish between private and public interests as reasons for will contests.³⁵ A private interest reflects merely pecuniary considerations of the heir.³⁶ If a will contains no dispositions contrary to the law or good morals, the will is only “susceptible to attack for causes of private interests.”³⁷ The contesting beneficiary will be penalized even though the judicial action brought by him merely requests an interpretation of the testament.³⁸ Further, if the lawsuit results in the court declaring the disposition null, the penalty will nonetheless be imposed on the beneficiary who brought the lawsuit.³⁹ However, French courts treat the heir more generously when the penalty provision appears ambiguous.⁴⁰ In those cases, “the tendency is to apply it mildly or not at all.”⁴¹ In sum, if the heir contests the will out of private or pecuniary considerations, and the will contains nothing contrary to the law or good morals, French courts typically enforce the penalty clause, even if the will is annulled.⁴²

The result may be different if the will contest is based on “public interest.” The analysis of a public interest attack focuses on whether the underlying disposition would effect a violation of the law or public order and good morals.⁴³ When the underlying disposition is against the law or public order, French courts apply Code Civil article 900 to illicit or immoral conditions,⁴⁴ the language of which

35. *Id.* at 423.

36. *Id.* Some examples of such “private interest” attacks are “a partition made by ascendants among their descendants, or for lesion beyond one-fourth.” AUBRY & RAU, *supra* note 12, § 692, at 297.

37. AUBRY & RAU, *supra* note 12, § 692, at 296–97.

38. *Id.* at 297. Brown refers to at least one French commentator who suggests that the heir may request an interpretation of the testament, and if the heir’s interpretation is not found to be violative of the decedent’s intent, the court is unlikely to enforce the penalty. Brown, *supra* note 6, at 425.

39. AUBRY & RAU, *supra* note 12, § 692, at 297.

40. Brown, *supra* note 6, at 425.

41. *Id.* at 425 (citing 11 FRANÇOIS LAURENT, *PRINCIPES DE DROIT CIVIL* § 490, at 638 (5th ed. 1893)).

42. AUBRY & RAU, *supra* note 12, § 692, at 297.

43. *Id.* at 295. Some examples of such illegal or immoral dispositions are those “made to persons incapable of receiving, or . . . donations or legacies that are either: tainted with substitutions, obtained through captation or suggestion, impinge upon the received portion of the heirs, or are contained in a testament which is null as to form.” *Id.* at 295–96.

44. For an interesting take on the history behind Code Civil article 900, see AUBRY & RAU, *supra* note 12, § 692, at 286 n.2 (claiming that the origin of this article “is traceable to the laws of the revolutionary period which were prompted by the apprehension that donors and testators would perpetuate the practices of the old regime in contravention of the new order under the guise of imposing conditions on their liberalities”); see also SWAIM & LORIO, *supra* note 12, § 12.3, at 297 n.5 (stating that Code Civil article 900 fulfilled a need of the

is virtually identical to its Louisiana counterpart.⁴⁵ In cases in which the main disposition is illicit or immoral, the penalty clause “automatically becomes against good morals, since it is surely . . . to the public interest that such dispositions in wills be attacked.”⁴⁶ Thus, the court will consider the penalty clause not written and will not impose the penalty upon the beneficiary.⁴⁷

The French approach can be illustrated by its application to Bob’s will and its contest by his daughter Debbie described in the introduction. Imagine that Debbie acquired a report from her father’s doctor that stated her father’s mind showed noticeable deterioration around the time his will was revised. Should Debbie decide to question whether her father had capacity to amend the testament,⁴⁸ the destiny of her entitlement to a portion of her father’s estate would depend on the validity of the underlying will.⁴⁹ If the court were to conclude that Bob lacked the necessary capacity, the will would be invalid. Thus, the penalty clause would be deemed unwritten, and Debbie would keep her entitlement. The problem would arise if the court ultimately decided that Bob was in sound mind at the time he amended his will. In this case, the testament would be valid, which would result in the automatic validity of the penalty clause. The penalty clause would then become enforceable and would effect a forfeiture of Debbie’s share.

revolution in France by preventing counterrevolutionary endeavors of “the privileged classes who could use donations and legacies to keep others (particularly children) in line, such as, conditions that forbade marrying lower classes, etc. Article 900 permitted the legatee to keep the bequest without fulfilling that illicit or immoral condition”).

45. Compare LA. CIV. CODE art. 1519 (2008) (“In all dispositions *inter vivos* and *mortis causa* impossible conditions, those which are contrary to the laws or to morals, are reputed not written.”) with THE FRENCH CIVIL CODE, *supra* note 12, at 187 (“In any *inter vivos* or testamentary disposition, impossible conditions or those which are contrary to laws or to morals are considered not written.”) (translating C. CIV. art. 900 (Fr.)).

46. Brown, *supra* note 6, at 423 (citing LAURENT, *supra* note 41, § 474, at 619).

47. *Id.* at 424.

48. The original example in the introduction was based on a situation giving rise to a potential claim of undue influence in Louisiana. However, Debbie’s suit alleging undue influence may be problematic under French law, which technically does not recognize “undue influence” as a legal concept. See generally Scalise, *supra* note 16 (discussing the functional equivalents of undue influence in jurisdictions not explicitly recognizing it as a legal concept).

49. Brown, *supra* note 6, at 423–24.

III. LOUISIANA'S APPROACH AND ITS PROBLEMS

Louisiana jurisprudence addressing penalty clauses spans over the past century and a half, yet courts have not proposed a clear standard for the analysis of such clauses. In fact, one decision mentioned that the validity of penalty clauses “has not been judicially determined with finality.”⁵⁰ Although Louisiana's approach to penalty clauses is uncertain, several general principles have emerged.

A. Determining Whether the Suit Is a Contest

When handling a suit based on a will with a penalty clause, a few Louisiana decisions begin by determining whether a particular lawsuit brought by the heir amounts to a contest within the language of the will.⁵¹ If the action does not amount to a contest, the penalty provision does not apply and there is no need for the court to determine its validity.⁵²

For example, in *Succession of Rosenthal*, the Louisiana Fourth Circuit Court of Appeal had to establish whether a lawsuit was a contest.⁵³ The executrix of the estate—the testator's widow—attempted to enforce a penalty provision in her late husband's will after the decedent's nephew filed suit.⁵⁴ The nephew, a legatee under the will, brought his judicial action against the executrix for improperly handling the estate.⁵⁵ The dispute arose in part because of the “shortage of cash required for the payment of the succession debts.”⁵⁶ The court refused to enforce the penalty clause, noting that the “appropriate action to have the will properly administered” did not constitute “an attack on the will as contemplated by the testator.”⁵⁷ By determining that the action by the plaintiff would not amount to a contest within the scope of the penalty provision, the fourth circuit correctly avoided the discussion of the validity

50. *Succession of Gardiner*, 366 So. 2d 1065, 1067 (La. App. 3d Cir. 1979), writ denied, 369 So. 2d 154 (La. 1979); see discussion *infra* Part III.D.

51. *Succession of Rouse*, 80 So. 229 (La. 1918); *In re Succession of Scott*, 950 So. 2d 846 (La. App. 1st Cir. 2006), writ denied, 948 So. 2d 176 (La. 2007); *Succession of Rosenthal*, 369 So. 2d 166 (La. App. 4th Cir. 1979), writ denied, 371 So. 2d 1345 (La. 1979); *Hughes v. Burguières*, 258 So. 2d 626 (La. App. 1st Cir. 1972), *aff'd in part*, 276 So. 2d 267 (La. 1973); see discussion *infra* Part V.A.

52. *Rouse*, 80 So. at 234; *Rosenthal*, 369 So. 2d at 178.

53. 369 So. 2d 166.

54. *Id.*

55. *Id.* at 170.

56. *Id.* at 169.

57. *Id.* at 178.

and enforceability of the clause. This case exemplifies the principle that certain judicial actions may not fall under the definition of the contest contemplated by the penalty clause.

B. Ascertaining the Testator's Intent

When the lawsuit does amount to a contest, Louisiana courts have consistently emphasized the need to ascertain the intent of the testator.⁵⁸ Obviously, by inserting a *penalty* clause in his will, the testator intends to do exactly that—penalize the contesting beneficiary. Louisiana courts nonetheless tend *not* to uphold penalty provisions. Under the banner of testamentary freedom, Louisiana jurisprudence finds creative ways to forgo the very intent behind the plain language of the threat of forfeiture.

The most striking example of a court's resourcefulness is the analysis in *Succession of Wagner*.⁵⁹ The estate in question was community property formerly existing between the testator and his pre-deceased wife.⁶⁰ The testator's four children and one grandson protested against the *mortis causa* donation of a piece of land to a certain Marie Amick, presumably the testator's mistress.⁶¹ The contestants alleged that their father only owned a one-half interest in the land and thus could not bequeath the entire interest to the mistress.⁶² Evidence indicated that the testator was aware that he could not bequeath the lot because he did not have full ownership of it.⁶³ Nonetheless, the testator's intent, as ascertained by the fourth circuit, was to ensure that the lot passed to the mistress.⁶⁴ To solidify this intent, the testator inserted a penalty clause threatening forfeiture of the disposable portion of the estate by the children should any of them "object to the . . . disposition of that particular

58. See, e.g., *Succession of Wagner*, 431 So. 2d 10, 12 (La. App. 4th Cir. 1983) ("[T]he testator's 'intention must be ascertained from the whole will, and effect must be given to every part of the will as far as the law will permit. . . . [T]he court should select that interpretation which will carry out the intention of the testator." (quoting *Succession of LaBarre*, 153 So. 15, 16 (La. 1934))); *Succession of Gardiner*, 366 So. 2d 1065, 1069 (La. App. 3d Cir. 1979) ("[I]n the interpretation of testaments the court must seek to carry out the intention of the testator." (citing *Carter v. Succession of Carter*, 332 So. 2d 439, 441 (La. 1976)), writ denied, 369 So. 2d 154 (La. 1979).

59. *Wagner*, 431 So. 2d 10.

60. *Id.* at 11.

61. *Id.* Note that the court never explicitly states that Marie Amick is the testator's mistress.

62. *Id.*

63. *Id.* at 12.

64. *Id.*

lot to [the mistress].”⁶⁵ The penalty clause specified that upon an objection, the disposable portion of the whole estate would go to the mistress.⁶⁶ Although the penalty provision clearly stated that the children would forfeit their portion if they *objected* to the disposition,⁶⁷ the court interpreted the provision as a conditional bequest, rather than as a penalty clause *per se*.⁶⁸ Under this interpretation, the court gave the heirs an option of either transferring their interest to the mistress or forfeiting the disposable portion of the estate.⁶⁹ The court noted that this “optional bequest [was] not repugnant to law or good morals and [was] valid as a conditional legacy.”⁷⁰

While the *Wagner* decision theoretically acknowledges the validity of the penalty clause, it does not mandate forfeiture due to the will contest; rather, it gives the heirs an option to comply with the condition at the threat of forfeiture.⁷¹ The contestants in this case were forced heirs, so the resulting forfeiture would not have stripped them of their legitime.⁷² Despite that, it appears that the court felt sympathetic to the children and therefore found a way to creatively interpret the penalty clause so as not to enforce it.

C. Exceptions to the Rule of Validity

Paradoxically, having never enforced a penalty clause, Louisiana decisions consistently make it clear that the clauses are not *per se* against the law or public policy.⁷³ Nonetheless, if the

65. *Id.* at 11.

66. *Id.*

67. *Id.*

68. *Id.* at 13. But see *Succession of Rouse*, 80 So. 229, 234 (La. 1918), where the court concluded, based on a similar factual matter, that the suit by the decedent’s children for the settlement of the community property existing between the children’s mother and father did not amount to a contest within the scope of the penalty clause. See discussion *infra* Part V.A.

69. *Wagner*, 431 So. 2d at 13.

70. *Id.*

71. *Id.* (“[The penalty clause] puts no one in a position to defeat a legacy by merely objecting or contesting the will. It simply implements the alternative provision if the heirs do not comply with the testator’s wishes.”).

72. *Id.*

73. See, e.g., *id.* at 13 (disagreeing with the heirs who claimed that penalty clauses are *contra bonos mores*); *Succession of Kern*, 252 So. 2d 507, 510 (La. App. 4th Cir. 1971) (noting that the clauses are enforceable if they are “restricted to protests or challenges by the legatees receiving a benefit from the will” and “in the absence of forced heirs”), *writ refused*, 254 So. 2d 462 (La. 1971). But see *Succession of Gardiner*, 366 So. 2d 1065, 1067 (La. App. 3d Cir. 1979) (“[The] validity of such a clause in Louisiana has not been judicially determined with finality.”), *writ denied*, 369 So. 2d 154 (La. 1979).

clause infringes on the rights of forced heirs, it will be invalidated as contrary to the law.⁷⁴ Although forced heirship has been radically curtailed,⁷⁵ invalidation of provisions contrary to the law remains a pertinent principle because it shows that in analyzing a penalty clause the court will look at the whole disposition, following the French approach.⁷⁶ Infringement upon the forced portion is just one illustration of how Louisiana courts handle the invalidity of the underlying disposition.

In *Hoggatt v. Gibbs*, the Louisiana Supreme Court reviewed a will implicating forced heirship.⁷⁷ The testator had three children, all of whom were his forced heirs.⁷⁸ The will contained a clause that required one of the testator's daughters to relinquish her claim to one-third of the whole estate, which amounted to more than \$100,000.⁷⁹ Instead, the testator bequeathed her \$20,000, threatening complete disinheritance should the daughter protest.⁸⁰ The dispute discussed by the supreme court dealt solely with the relinquishment of a claim to real estate.⁸¹ The court did not analyze the applicability of the penalty clause, but in dicta noted that the testator's clause mandating that the daughter abandon her lawful claim to one-third of the estate "was contrary to law"⁸² The court cited article 1506 of the 1825 Louisiana Civil Code, which is the same as the current article 1519.⁸³

Another exception from the general rule of validity established by Louisiana jurisprudence encompasses penalty provisions with overbroad language and effect. For instance, in *Succession of Kern*,

74. *Wagner*, 431 So. 2d at 13 (noting that the penalty clause was valid where it did not "deprive the forced heirs of anything they [were] legally entitled to, i.e., their legitime"); *Kern*, 252 So. 2d at 510.

75. See generally Katherine Shaw Spaht et al., *The New Forced Heirship Legislation: A Regrettable "Revolution,"* 50 LA. L. REV. 409 (1990) (discussing the impact of 1989 La. Acts No. 788 limiting forced heirship to children under the age of twenty-three or individuals who are interdicted or subject to interdiction).

76. But see *Gardiner*, 366 So. 2d 1065 (refusing to address the validity of the underlying disposition and dismissing plaintiff's suit for failure to state a cause of action). See discussion *infra* Part III.D.

77. 12 La. Ann. 770 (La. 1857).

78. *Id.* at 771.

79. *Id.* at 771-72.

80. *Id.* at 772.

81. *Id.* at 770.

82. *Id.* at 771-72.

83. *Id.* at 772. "In all dispositions *inter vivos* and *mortis causa* impossible conditions, those which are contrary to the laws or to morals, are reputed not written." LA. CIV. CODE art. 1506 (1825) (current version at LA. CIV. CODE art. 1519 (2008)).

the fourth circuit invalidated a penalty provision in a testament.⁸⁴ The will contained three particular bequests.⁸⁵ One of the decedent's nieces received \$10,000; another niece inherited all of the decedent's jewelry.⁸⁶ The third bequest in the amount of \$10,000 was for the Crippled Children's Hospital in New Orleans.⁸⁷ The remainder of the estate was to be distributed among the decedent's brothers and sisters on a condition that the \$10,000 for the Crippled Children's Hospital was to be paid from the portion of the decedent's sister.⁸⁸ The will further included a penalty provision that would effect a forfeiture by *all the legatees* if the will was attacked "in any way by *any heir*."⁸⁹ The will provided that the Crippled Children's Hospital was to receive all of the estate should the penalty clause be triggered by a contest.⁹⁰ The decedent's will was attacked by his nephew who was not a named legatee, and yet was technically a collateral heir.⁹¹ The Crippled Children's Hospital intervened in the lawsuit, arguing that the penalty clause was valid and should be enforced.⁹² The fourth circuit disagreed, noting that the potential of a contest by any heir, whether or not he is a named legatee under the will, left the legatees "virtually helpless and at the mercy of any heir not mentioned in the will."⁹³ The court proceeded to underscore that the penalty clause was "particularly vicious since there is a third party [i.e., the Crippled Children's Hospital], not an heir, designated to reap the benefits of a protest or challenge by 'any heir.'"⁹⁴ This broad provision was "repugnant to law and good morals and [could not] be sanctioned by the courts."⁹⁵

As *Hoggatt* and *Kern* both demonstrate, Louisiana courts will not indiscriminately enforce penalty provisions. Although they emphasize the need to ascertain and carry out the testator's

84. 252 So. 2d 507 (La. App. 4th Cir. 1971), *writ refused*, 254 So. 2d 462 (La. 1971).

85. *Id.* at 508.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 510 (emphasis added).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* But see *Succession of Gardiner*, 366 So. 2d 1065, 1067 (La. App. 3d Cir. 1979) (providing no comment on the overbreadth of the clause that, in place of the entitlement, threatened to bequeath the sum of one dollar not only to the contestant, but also the "spouse and/or issue of such person"), *writ denied*, 369 So. 2d 154 (La. 1979). See discussion of *Gardiner* *infra* Part III.D.

intent,⁹⁶ courts will look at the effect of the clause to determine whether it violates the law or public policy. If so, courts will invalidate the penalty provision.

D. The Effect of Invalidating the Penalty Clause

If a particular penalty provision is determined to be invalid, as happened in *Kern*, courts follow article 1519: the penalty clause will be struck from the will, and the testament will be reviewed as if the penalty clause were not written.⁹⁷ Indeed, the court in *Kern* concluded that "the penal clause is *contra bonos mores*, null in its entirety and therefore regarded as if it were not in the will."⁹⁸ The court is correct to annul the entire penalty provision, meaning both the forfeiture clause proper (warning that the legatees will forfeit in case of a contest) and the residuary clause (allocating the whole estate to the Crippled Children's Hospital after forfeiture occurs).

However, the Louisiana Third Circuit Court of Appeal in *Succession of Gardiner* took a different approach: it distinguished the penalty provision from the residuary disposition, noting that the two parts were to be read as alternatives.⁹⁹ The will in that case contained a forfeiture clause composed of two sentences.¹⁰⁰ The first forewarned that the contestant and the contestant's spouse and children would relinquish their bequest and instead receive one dollar.¹⁰¹ The penalty clause then specified that if the will was invalidated and intestacy resulted as to all or a portion of the estate, the forfeited portion would go to certain charitable entities.¹⁰² The testament in *Gardiner* provided that the immovable property located outside of the decedent's home state of Connecticut was to make up the corpus of a trust.¹⁰³ The will further mandated that the immovables in Louisiana be alienated last by the trustees after all other assets under the will were disbursed.¹⁰⁴ When the last income beneficiary died, the rest of the trust assets were to be distributed

96. See *supra* note 58.

97. *Carter v. Succession of Carter*, 332 So. 2d 439 (La. 1976); *Gardiner*, 366 So. 2d at 1068 ("[If] the penalty clause is invalid, the effect of such a holding would be to strike the penalty clause from the testament, leaving the remainder of the will as written."); *Succession of Burgess*, 359 So. 2d 1006 (La. App. 4th Cir. 1978). But see *Succession of Thompson*, 49 So. 651 (La. 1909) (striking down the entire will because of an impossible condition).

98. *Kern*, 252 So. 2d at 509.

99. *Gardiner*, 366 So. 2d at 1069.

100. *Id.* at 1067-68.

101. *Id.* at 1067.

102. *Id.* at 1068.

103. *Id.* at 1066.

104. *Id.*

among the decedent's grandnephews, a few hospitals, and a university.¹⁰⁵

The decedent's niece challenged the will in Louisiana, alleging that the portion of the will affecting the immovables located within the state was null and void under Louisiana law,¹⁰⁶ as the trust provisions contained prohibited substitutions and violated laws as to "the length of time immovables can be kept out of commerce."¹⁰⁷ Notably, the third circuit never discussed the possibility of enforcing the penalty against the niece; instead it concluded that the penalty clause provided enough grounds to grant the defendants' exception of no cause of action.¹⁰⁸ The court first mentioned that the validity of penalty clauses in Louisiana "has not been judicially determined with finality."¹⁰⁹ It then acknowledged that if the penalty clause was invalid, "the effect of such a holding would be to strike the penalty clause from the testament, leaving the remainder of the will as written."¹¹⁰

In construing the penalty provision, the court unexpectedly divided it into two parts and considered only the first sentence that threatened forfeiture to be the penalty clause proper.¹¹¹ The second sentence naming different charities as residual legatees was regarded by the court as an entirely separate provision, even though both were contained in the same article of the will.¹¹² The court disagreed with the plaintiff's contention that the "provision making the charities residuary legatees as to any invalid donations is inseparable from the 'penalty clause' contained in the first sentence of [the] article."¹¹³ It was clear to the court that the two provisions were "intended as alternatives," thus making it unnecessary to decide on the validity of the penalty clause.¹¹⁴ Without any clarification, the court noted that, even if the penalty clause were to be found invalid, the invalidity would not affect the residuary bequest, which would still be valid.¹¹⁵ Continuing its confusing reasoning, the third circuit concluded that the plaintiff had "no cause of action to annul the testament at issue."¹¹⁶

105. *Id.*

106. *Id.*

107. *Id.* at 1069.

108. *Id.* Defendants were the executors, income beneficiaries, and corpus beneficiaries. *Id.* at 1066.

109. *Id.* at 1067.

110. *Id.*

111. *Id.* at 1069.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

Gardiner leaves open many questions. First, retaining the residuary disposition despite the annulment of the penalty provision would lead to absurd results in many circumstances. For instance, in *Kern*, the residuary clause stated that the whole estate would pass to the Crippled Children's Hospital should the penalty clause be triggered.¹¹⁷ The residuary disposition would apply only after forfeiture occurred.¹¹⁸ The fourth circuit in that case rightly invalidated the penalty provision as a whole.¹¹⁹ After *Gardiner*, courts may separately analyze each subpart of the penalty clause. But severing only one sentence seems to violate the testator's intent behind the penalty provision: the second sentence naming the residuary legatees is essential and ordinarily inseparable from the first sentence that threatens forfeiture.¹²⁰

Second, the result reached by the *Gardiner* court shielded the will from contest by declaring that the plaintiff had no cause of action.¹²¹ Yet, the penalty clause was not upheld as to result in the plaintiff's forfeiture.¹²² As in *Wagner*, where the court did not enforce the penalty clause against the decedent's children,¹²³ perhaps the court in *Gardiner* felt sympathetic for the niece. However, the reason for the court's ruling is unclear due to the lack of explanation.

Third, the *Gardiner* court did not follow the traditional French approach of determining the validity of the underlying disposition.¹²⁴ A challenge based on prohibited substitutions is one involving public interests, which creates a valid ground for contest under French law.¹²⁵ Breaking up the penalty clause into two subparts, the court in *Gardiner* found that even if the attack was successful, the purpose of the second part of the penalty clause was "to provide for the disposition of any invalid donations."¹²⁶ The court stated that since the plaintiff failed to state a cause of action, it was not necessary to "decide the merits of the difficult questions raised by the plaintiff with regard to whether the trust provisions contain prohibited substitutions or *fidei commissa*, whether the

117. Succession of Kern, 252 So. 2d 507, 510 (La. App. 4th Cir. 1971), writ refused, 254 So. 2d 462 (La. 1971).

118. *Id.*

119. *Id.*

120. *Gardiner*, 366 So. 2d at 1069.

121. *Id.*

122. *Id.*

123. Succession of Wagner, 431 So. 2d 10, 13 (La. App. 4th Cir. 1983).

124. *Gardiner*, 366 So. 2d at 1069.

125. AUBRY & RAU, *supra* note 12, § 692, at 295-96; see discussion *supra* Part II.B.

126. *Gardiner*, 366 So. 2d at 1069.

trust provisions violate laws dealing with the length of time immovables can be kept out of commerce,” and other contentions of the plaintiff.¹²⁷ Dismissing the plaintiff’s suit for failure to state a cause of action, the third circuit further confused Louisiana’s already perplexing approach to penalty clauses.¹²⁸

E. The Problem of Validity and Enforceability

The seemingly irreconcilable decisions discussed above demonstrate that Louisiana courts have found many ingenious ways to tackle penalty clauses. As a result of this creativity and, perhaps, sympathy for the contesting beneficiary, no penalty provision has ever been upheld as to effect the contesting beneficiary’s forfeiture. Louisiana courts simply never have been required to determine what would happen to the contesting beneficiary if the penalty clause is valid. In relation to the destiny of the contesting beneficiary, the French approach of reviewing the underlying disposition is inadequate not only because of its harshness, but also because it determines only the validity of the disposition, without analyzing the enforceability of the penalty clause.¹²⁹

The French approach is likely to cause confusion because the questions of the validity of the whole disposition, the validity of the penalty clause, and the enforceability of the penalty clause are three separate and distinct inquiries. The analysis of the validity of the disposition is illustrated by *Hoggatt*, the case implicating forced heirship.¹³⁰ Because the disposition in that case infringed on the forced portion of the testator’s daughter, it was contrary to the law.¹³¹ Thus, the penalty clause was automatically void.¹³² Now returning to the characters from the introductory example, assume that Bob’s will asserted that Debbie would get her share only if she married a man of the same race. Suspecting that Louisiana courts would not sanction this condition, Bob inserted a penalty clause to

127. *Id.*

128. *Id.*

129. As a reminder, the French approach, which Louisiana purports to follow, directly depends on the success of the contest and concentrates on the underlying disposition: if the whole disposition contains nothing contrary to the law or public policy, the penalty clause is valid and thus automatically enforceable. *But see id.* at 1069 (dismissing the plaintiff’s contest for failure to state a cause of action and never discussing the validity of the underlying disposition).

130. *Hoggatt v. Gibbs*, 12 La. Ann. 770 (La. 1857); *see discussion supra* Part III.C.

131. *Hoggatt*, 12 La. Ann. at 771–72.

132. *Id.*

prevent Debbie from challenging the will. This disposition is clearly invalid as against public policy; as a result the court would strike the entire condition, including the penalty clause, from the will. *Hoggatt* and other cases like the hypothetical with a similar problem of the invalidity of the underlying disposition are the limited examples of the effectiveness of the French approach.

However, the validity of the underlying disposition is not in itself sufficient to automatically validate the penalty clause. For instance, in *Kern*, the dispositions contained in the will were valid, and yet the penalty clause was found to be invalid and unenforceable.¹³³ There was nothing suspicious or questionable about the dispositions contained in the will—it was the penalty clause that created the problem.¹³⁴ The penalty clause threatened to punish *all* of the legatees under the will should the will be attacked “in any way by *any* heir.”¹³⁵ The contestant did not have to be a legatee under the will.¹³⁶ The court refused to uphold the overbroad provision because a third party could assert virtually unlimited control over the legatees.¹³⁷ To illustrate how a valid disposition may still contain an invalid penalty clause, imagine that Bob left his entire estate to his three children to be divided equally among them. There is nothing objectionable about this bequest, but the will also contained a penalty clause threatening forfeiture by *all* children should *any* one of them contest the will. The will specified that in case of enforcement of the penalty clause, the whole estate be burned to ashes so as to deprive everyone of its ownership. As in *Kern*, the court would likely invalidate the penalty clause here as well. First, it is overbroad in its effect: if Debbie, the oldest child, challenges the will, the other two innocent descendants would forfeit their share. Second, there is a strong public policy against wasting property. Despite the annulment of the penalty clause, the rest of the testament would remain valid and enforceable. In this way, *Kern* and the hypothetical case illustrate that it is necessary to separate the analysis of the underlying disposition from the inquiry into the validity of the penalty clause. Indeed, the dispositions can be valid, and yet the penalty clause may be invalid and unenforceable.

Further, even if the will itself contains nothing reprehensible, and the penalty clause is not contrary to the law or public order, in

133. Succession of Kern, 252 So. 2d 507 (La. App. 4th Cir. 1971), *writ refused*, 254 So. 2d 462 (La. 1971); see discussion *supra* Part III.C.

134. *Kern*, 252 So. 2d at 510.

135. *Id.* (emphasis added).

136. *Id.*

137. *Id.*

some circumstances enforcing the penalty clause against the contesting beneficiary may be unfair. That is to say, the validity of both the underlying disposition and the penalty clause should not automatically result in enforcement of the penalty. There may be legitimate grounds for contest, such as "lack of testamentary capacity, fraud, undue influence, improper execution, forgery, or subsequent revocation by a later will," for which the contesting beneficiary should not be punished by forfeiture.¹³⁸ In the example in the introduction, Bob's daughter Debbie had every reason to believe that Abby, the bookkeeper, exerted undue influence upon Bob. Abby was not related to Bob, and she held a confidential position as Bob's assistant. Only Abby and her relatives were present during the amendment of Bob's will, and Bob's mind was clouded before his death. As a result of the amendment, Abby received twenty-five percent of the estate. Based on the evidence, the court nonetheless could conclude that undue influence was not present because Abby was a diligent assistant whom Bob wanted to reward for all her hard work. The testament would then be found valid by the court. Additionally, the standard format of the penalty provision does not raise suspicion and is not overbroad, so it would likely be found valid as well. Nevertheless, Debbie had no way of knowing what the judge would conclude based on the evidence. This situation illustrates that the validity of the disposition and of the penalty clause contained therein should not always result in forfeiture; in other words, validity does not equal enforceability. Where the facts strongly indicate the potential of undue influence (or fraud, forgery, etc.), the legatee has no way to predict the court's final conclusion.¹³⁹ This example demonstrates the inadequacy of the civil law's automatic enforceability approach.

F. The Confusion of Louisiana's Approach and the Need to Find a Solution

The perplexed state of Louisiana's approach to penalty clauses poses problems not only for legatees under a will, but also for testators and practitioners advising those testators in regard to estate planning. From the example in the introduction, Bob's daughter Debbie is quite daring to bring suit for invalidation of her

138. Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary*, 23 A.L.R. 4TH 369 (1983) [hereinafter *Validity Annotation*].

139. Brown, *supra* note 6, at 424 ("This appears to be a peculiarly strict and uncomfortable rule as far as the doubtful legatee or heir is concerned. He is as a matter of fact debarred from the court unless he is ready to stake everything on the outcome.").

father's will. It may be somewhat comforting to Debbie that no penalty clause has ever been enforced in Louisiana, but the lack of an analytical framework in the law makes will contests a perilous enterprise. The risk is great, as Debbie may forfeit her entire bequest if the court decides to implement the penalty of forfeiture. Thus, her options are (1) to give up twenty-five percent of what she counted on as being hers just a few days before her father passed away or (2) to risk the remaining seventy-five percent of the estate that her father bequeathed her. Is a bird in the hand worth two in the bush? It very well may be, considering the jurisprudential confusion regarding penalty clauses. Testators like Bob also are in a precarious position because, thus far, no Louisiana court has enforced a penalty provision, thereby ignoring the testator's desire to avoid the skirmish over his estate. Moreover, in advising people of estate planning, Louisiana practitioners may be reluctant to recommend using a penalty provision and may avoid this "toothless" device, preferring instead to resort to alternative measures.

In analyzing Debbie's claim, will the court follow the example of *Gardiner* and dismiss the suit for failure to state a cause of action without analyzing the validity of the will? Will the court conclude that Debbie's suit is not a contest triggering the penalty clause, as did *Rosenthal*? Or, perhaps, as in *Wagner*, will the court ascertain that the disposition is a conditional donation, contingent upon Debbie acquiescing in Bob's wish to bequeath to Abby? And, ultimately, if the court concludes that the will and the penalty clause are both valid, will the court punish Debbie by enforcing the penalty clause? How much weight will the court afford Bob's intent to punish the contestant?

IV. COMMON LAW APPROACH AND HISTORY

Neither the confused Louisiana jurisprudence nor the traditional French approach provide an adequate resolution for the courts' earnest quest to offer an equitable result for all parties. The language barrier and general lack of access to foreign sources make it difficult to seek guidance in today's civil law.¹⁴⁰ Perhaps Louisiana could once again look to common law for an analytical framework applicable to penalty clauses. In the past, Louisiana law of successions and donations has borrowed liberally from common

140. See generally Roger Ward, *The Death of the French Language in Louisiana*, in *LOUISIANA: MICROCOSM OF A MIXED JURISDICTION* 41 (Vernon Palmer ed., 1999).

law.¹⁴¹ This is a welcome trend as it promotes uniformity and facilitates interstate will probate. Moreover, the U.S. common law boasts of abundant jurisprudence and doctrine tackling no-contest provisions. In fact, common law has a long history of dealing with penalty clauses and of managing to accomplish fair and equitable resolution of the issue.

A. British Common Law: The Emergence of the Good Faith, Probable Cause Exception

Throughout the years, common law has formulated not one but many approaches to analyzing penalty clauses.¹⁴² In Great Britain, equity and chancery courts had concurrent jurisdiction over testaments.¹⁴³ Historically, devises of real property were governed by common law courts of chancery, and bequests of personal property were subject to the civil law rules of ecclesiastical courts.¹⁴⁴ In cases dealing with real estate, the English common law viewed penalty clauses as valid and enforceable even if there was no residual disposition, called a gift over.¹⁴⁵ Conversely, ecclesiastical courts, with their civil law foundation,¹⁴⁶ regarded penalty clauses enforceable only when a personal property devise contained a gift over clause.¹⁴⁷ When personal property devises did

141. See, e.g., Laurie Dearman Clark, *Louisiana's New Law on Capacity to Make and Receive Donations: "Unduly Influenced" by the Common Law?*, 67 TUL. L. REV. 183, 228 (1992) (stating that Louisiana law regarding mental capacity, fraud, duress, and undue influence as grounds for nullity in donations are based in common law); Cynthia Ann Samuel, *The 1997 Successions and Donations Revision—A Critique in Honor of A.N. Yiannopoulos*, 73 TUL. L. REV. 1041, 1067 (1999) (noting that the Louisiana rule of anti-lapse is based on a typical common law anti-lapse provision). Additionally, the concepts behind a few Civil Code articles come from common law. See, e.g., LA. CIV. CODE art. 1493 (2008) (forced heirship); LA. CIV. CODE art. 1478 (2008) (undue influence).

142. See generally *Validity Annotation*, *supra* note 138.

143. Begleiter, *supra* note 2, at 649. See generally EDGAR BODENHEIMER ET AL., AN INTRODUCTION TO THE ANGLO-AMERICAN LEGAL SYSTEM 26 (4th ed. 2004) (discussing the British court system).

144. See Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225, 239 (1998) (producing a thorough historical account with vivid and entertaining examples of the earliest known penalty clauses); see also *Moskowitz v. Federman*, 51 N.E.2d 48, 54 (Ohio Ct. App. 1943) (providing a brief historical account).

145. Beyer et al., *supra* note 144, at 239 (citing 5 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 44.29, at 470 (1962)).

146. *Id.* at 239; cf. Brown, *supra* note 6, at 425 (“[T]he only place from which [the ecclesiastical courts’ approach] could have possibly come in the Roman law is from the abandoned doctrine of absolute invalidity once advanced by the Proculians.”).

147. *Moskowitz*, 51 N.E.2d at 54.

not include a gift over provision, ecclesiastical courts considered them unenforceable and viewed them as *in terrorem*, or mere threats,¹⁴⁸ since the goal of such clauses was "to frighten the legatee into compliance."¹⁴⁹

One of the earliest known decisions was the High Court of Chancery's analysis in *Powell v. Morgan*, where the testatrix devised her land to an heir upon the condition that the heir refrain from contesting her will.¹⁵⁰ Responding to the heir's challenge of the will, the High Court of Chancery found that the challenge occurred for probable cause and did not enforce the penalty.¹⁵¹ Without giving reasons for its conclusion, this seminal decision "developed the first rudimentary good faith, probable cause exception" to enforcing penalty clauses.¹⁵²

To understand the intricacy of the British common law approach, recall Bob's will. The jurisdiction and the analysis would depend on whether Bob's will was devising real or personal property. If Bob owned and bequeathed only his jewelry, or personal property, his will would be probated by a civil law ecclesiastical court. The ecclesiastical court would review the penalty clause to see whether it included a gift over, that is, whether Bob named a residuary legatee in case of forfeiture by the contestant-legatee. Because Bob's penalty clause did not contain such a clause, the court would consider the penalty provision a mere threat and would not give it any effect.¹⁵³ On the other hand, if Bob's estate included a parcel of land, or real property, the chancery courts would have jurisdiction over Bob's will. In this case, if Bob's daughter Debbie decided to contest the will, the court would find the penalty provision enforceable unless Debbie's suit could qualify for a *Powell* good faith, probable cause exception.¹⁵⁴ The court in *Powell* did not provide any insight into the applicability of the exception, but the tradition of affording

148. Beyer et al., *supra* note 144, at 239.

149. *Moskowitz*, 51 N.E.2d at 54.

150. Beyer et al., *supra* note 144, at 236 (citing *Powell v. Morgan*, (1688) 23 Eng. Rep. 668 (Ch.); Browder, *supra* note 7, at 320 n.1; Jack Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 HASTINGS L.J. 45, 48 n.12 (1963)).

151. *Id.* (citing *Powell*, 23 Eng. Rep. at 668).

152. *Id.* (citing Dawn Koren, *No-Contest Clauses: Settlement Offers from the Grave*, 12 PROB. L.J. 173, 176 (1995); Leavitt, *supra* note 150, at 59).

153. An example of a penalty clause that would be considered to contain a gift over under British law is the testament in *Kern*, where, in case of forfeiture, the estate was to pass to the Crippled Children's Hospital. Succession of Kern, 252 So. 2d 507, 510 (La. App. 4th Cir. 1971), *writ refused*, 254 So. 2d 462 (La. 1971).

154. *Powell*, 23 Eng. Rep. 668.

leeway to contestants suing in good faith and for probable cause was carried on by the American common law.¹⁵⁵

B. The American Common Law History

Early on, American courts tended to pick and choose what they wanted to follow from British law. The earliest known decision of an American court on the issue of no-contest clauses is *Bradford v. Bradford*.¹⁵⁶ The case upheld the *in terrorem* provision, noting that reasonable penalty conditions are “in conformity with good policy . . . to prevent litigation.”¹⁵⁷ Imposing the penalty of forfeiture upon the contestant, the court rejected the traditional British approach of distinguishing between real and personal property and the requirement for a gift over provision.¹⁵⁸

Later, in the 1898 case of *Smithsonian Institution v. Meech*, the United States Supreme Court expressed its view on a penalty provision.¹⁵⁹ The testator in that case left a legacy to some of his family members, stating that “bequests are all made upon the condition that the legatees acquiesce in this will.”¹⁶⁰ In the event of forfeiture due to an attack upon the will, the testator bequeathed “the share or shares of any disputing this will to the residuary legatee,” the Smithsonian Institution.¹⁶¹ The Court upheld the *in terrorem* provision, employing some of the most frequently cited language in support of penalty clauses.¹⁶² It concluded that penalty clauses are “good law and good morals” as they prevent from being “brought to-light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial, and as a result the manifest intention of the testator is thwarted.”¹⁶³ The legacies of *Bradford*—which abolished the gift over requirement and eliminated the distinctions between realty and personalty—and of *Meech*—which underscored the positive aspects of penalty

155. Beyer et al., *supra* note 144, at 236.

156. 19 Ohio St. 546, 547 (Ohio 1869).

157. *Id.* at 548.

158. *Id.* at 547, 549. Some U.S. states still condition the validity of the penalty clause upon the requirement of a gift over. *See, e.g.*, GA. CODE ANN. § 53-4-68 (West 2003) (“A condition in *terrorem* shall be void unless there is a direction in the will as to the disposition of the property if the condition in *terrorem* is violated, in which event the direction in the will shall be carried out.”).

159. 169 U.S. 398 (1898).

160. *Id.* at 402.

161. *Id.*

162. Beyer et al., *supra* note 144, at 240 n.95 (citing Browder, *supra* note 7, at 332).

163. *Smithsonian Inst.*, 169 U.S. at 415.

provisions—have survived throughout the years and persist in American common law today.

C. The American Common Law Today

The modern common law approach varies from state to state.¹⁶⁴ States initially treat penalty clauses as either valid or invalid, but most of the time they are willing to deviate from those classifications for varying reasons.¹⁶⁵ For example, two states, Florida and Indiana, have statutes that hold penalty clauses unenforceable regardless of the circumstances.¹⁶⁶ Georgia regards penalty clauses as invalid unless there is a direction in the will as to the disposition of the property if the penalty clause is violated.¹⁶⁷ New York, on the other hand, presumes a penalty clause is valid unless the beneficiary contests for one of a number of statutorily prescribed reasons.¹⁶⁸ The courts of some common law states will

164. Even within a particular state, the approach is not always uniform. See Sharon J. Ormond, *No Contest Clauses in California Wills and Trusts: How Lucky Do You Feel Playing the Wheel of Fortune?*, 18 WHITTIER L. REV. 613, 657 (1997) (providing a detailed account of California's unstable approach to *in terrorem* clauses and noting that "[t]he history of the California courts' interpretation of no contest clauses has been long and somewhat schizophrenic"). For a comprehensive fifty-state survey on the issue, see Beyer et al., *supra* note 144; see also *Validity Annotation*, *supra* note 138.

165. One scholar has described the states' treatment of penalty clauses as falling under one of four broad categories: "(1) void, (2) valid but usually ineffective as overbroad, (3) generally valid, (4) valid unless the contestant brought the will contest in good faith and with probable cause." Beyer et al., *supra* note 144, at 242.

166. See, e.g., FLA. STAT. ANN. § 732.517 (West 2005) ("A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable."); IND. CODE ANN. § 29-1-6-2 (West 1999) ("If, in any will admitted to probate in any of the courts of this state, there is a provision or provisions providing that if any beneficiary thereunder shall take any proceeding to contest such will or to prevent the admission thereof to probate, or provisions to that effect, such beneficiary shall thereby forfeit any benefit which said will made for said beneficiary, such provision or provisions shall be void and of no force or effect.").

167. See, e.g., GA. CODE ANN. § 53-4-68 (West 2003) ("A condition in *terrorem* shall be void unless there is a direction in the will as to the disposition of the property if the condition in *terrorem* is violated, in which event the direction in the will shall be carried out."); *Linkous v. Nat'l Bank of Ga.*, 274 S.E.2d 469, 470 (Ga. 1981) (invalidating the *in terrorem* clause in the will in the absence of a gift over and noting that no contest clauses are "not favored in the law and, like all restrictions, must be strictly construed").

168. See, e.g., Anne Marie Guglielmo, *In Terrorem Clauses: Do They Really Work?*, 26 WESTCHESTER B.J. 19 (1999). The author states that penalty provisions are generally valid in New York and lists statutory exceptions, the

not enforce penalty provisions if the testator tries to assert too much control over the legatees or if the clause is overbroad in any other way.¹⁶⁹

The most prevalent approach is that endorsed by the Uniform Probate Code (UPC) and Restatement (Third) of Property.¹⁷⁰ The UPC views penalty clauses as valid unless the contest was brought in good faith and for probable cause.¹⁷¹ Depending on the jurisdiction, the exception for good faith, probable cause contests may be codified or based in common law.¹⁷² The states that codify the good faith, probable cause exception generally follow the relevant provision of the UPC—section 2-517—which mandates that “[a] provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.”¹⁷³ The good faith, probable cause exception effectively preserves the contesting beneficiary’s share even if the no-contest clause is valid. The chief reason for allowing the good faith, probable cause exception is that “public policy

application of which precludes forfeiture by the contestant as a matter of law; the contestant may:

(1) [B]ring a contest to establish that the will is a forgery or that it was revoked by a subsequent will, provided that such a contest is based on probable cause; (2) object to the jurisdiction of the probate court; (3) disclose any information to any party or to the court related to any document offered for probate; (4) refuse or fail to join in a petition for probate and/or refuse to sign a “waiver and consent” to probate; (5) to conduct preliminary examinations of the will’s attesting witnesses, draftsperson, nominated executors and proponents in a probate proceeding; and (6) institute, join or acquiesce in a will construction proceeding, without violating an in terrorem clause.

Id. at 20.

169. Beyer et al., *supra* note 144, at 244.

170. See generally Ronald J. Scalise, Jr., *New Developments in United States Succession Law*, 54 AM. J. COMP. L. 103, 114 n.59 (2006) (providing a list of states that have recently adopted the approach of the good faith, probable cause exception).

171. UNIF. PROBATE CODE §§ 2-517, 3-905 (amended 1997); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.5 (2003).

172. Ronald Z. Domsy, *In Terrorem Clauses: More Bark Than Bite?*, 25 LOY. U. CHI. L.J. 493, 496–97 (1994).

173. UNIF. PROBATE CODE § 2-517 (1997); see also *id.* § 3-905 (containing the identical language as applied to Probate and Administration of Wills); cf. RESTATEMENT (THIRD) OF PROP., *supra* note 171, § 8.5 (“A provision in a donative document purporting to rescind a donative transfer to, or a fiduciary appointment of, any person who institutes a proceeding challenging the validity of all or part of the donative document is enforceable unless probable cause existed for instituting the proceeding.”).

demands that courts admit to probate only those wills where the testator possessed testamentary capacity, that were executed in accordance with the statutory formalities, and that were not the product of undue influence.”¹⁷⁴

The eligibility of a beneficiary for the good faith, probable cause exception is a fact-specific inquiry.¹⁷⁵ This case-by-case approach achieves equitable results because the court reviews the policy behind enforcing a particular penalty clause. Due to the myriad of potential situations surrounding will contests, it is difficult to develop a single definition of probable cause. A recent decision by the Supreme Court of Arizona adopted the Restatement (Second) of Property definition of the term: “the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful.”¹⁷⁶ This “reasonable person” inquiry reviews the objective reasons for will contests.¹⁷⁷ The Arizona decision also emphasized that good faith of the contestant is essential because “subjective belief in the basis of the challenge is part of the required belief in the substantial likelihood of success.”¹⁷⁸ Thus, the approach taken by the court reviews the subjective and objective reasonableness of “the substantial likelihood of success” at the time the action was brought.¹⁷⁹ The

174. Begleiter, *supra* note 2, at 641 (citing *S. Norwalk Trust Co. v. St. John*, 101 A. 961, 963 (Conn. 1917); *Porter v. Baynard*, 28 So. 2d 890, 897 (Fla. 1946); *In re Cocklin's Estate*, 17 N.W.2d 129, 136 (Iowa 1945); *In re Hartz's Estate*, 77 N.W.2d 169 (Minn. 1956); *Haynes v. First Nat'l State Bank of N.J.*, 432 A.2d 890, 903 (N.J. 1981); *In re Estate of Seymour*, 600 P.2d 274, 278 (N.M. 1979); *In re Kathan's Will*, 141 N.Y.S. 705 (N.Y. Sur. Ct. 1913); *Ryan v. Wachovia Bank & Trust Co.*, 70 S.E.2d 853, 856 (N.C. 1952); *In re Friend's Estate*, 58 A. 853 (Pa. 1904); *Hodge v. Ellis*, 268 S.W.2d 275 (Tex. Civ. App. 1954), *modified on other grounds*, 277 S.W.2d 900 (Tex. 1955); *First Methodist Episcopal Church S. v. Anderson*, 110 S.W.2d 1177 (Tex. Civ. App. 1937); *Calvery v. Calvery*, 55 S.W.2d 527, 530 (Tex. Comm'n App. 1932)).

175. 80 AM. JUR. 2D *Wills* § 1340 (2008).

176. *In re Estate of Shumway*, 9 P.3d 1062, 1066 (Ariz. 2000) (quoting RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 9.1 cmt. j (1983)) (emphasis omitted).

177. *Id.*

178. *Id.*

179. *Id.* at 1066. Two of the testator's daughters contested a will that left one-fourth to his bookkeeper. *Id.* at 1064. The trial judge enforced the penalty provision against the daughters after concluding that the will was valid and that there was no undue influence. *Id.* The court of appeals affirmed, relying on the trial court's finding that there was no undue influence. *Id.* The supreme court reversed, emphasizing the need to review whether the contestant could be eligible for the good faith, probable cause exception at the time the proceedings were instituted, not after the trial court finished its fact-finding. *Id.* at 1069. The

“good faith” prong concentrates on the subjective state of mind of the contestant, while the “probable cause” aspect dwells on the objective circumstances surrounding the contest. In applying the articulated standard to the provision in the will, courts have noted that penalty clauses are not favored because of the resulting forfeiture.¹⁸⁰ This warrants the liberal application of the good faith, probable cause exception.¹⁸¹

Thus, if Debbie filed suit to annul her father’s will for reasons of undue influence in one of the many common law states that endorse the good faith, probable cause exception, the outcome of the suit would depend on whether she could demonstrate that her lawsuit was objectively and subjectively reasonable.¹⁸² Application of the exception achieves an equitable result as it permits the court to properly balance the countervailing policies: Bob’s freedom to dispose of his estate and Debbie’s right to sue. Using this analysis, American courts are able to reach equitable results, and Louisiana should follow their example.

V. SOLUTION FOR LOUISIANA: A FRAMEWORK FOR ANALYSIS OF PENALTY CLAUSES

The ideal framework for Louisiana’s analysis of penalty clauses is an amalgam of Louisiana jurisprudence, the traditional French approach, and the prevalent analysis of the American

court found that there was probable cause for a contest due to the circumstances surrounding the drafting and execution of the will. *Id.* at 1068.

But see *Russell v. Wachovia Bank, N.A.*, 633 S.E.2d 722 (S.C. 2006), for an example of a case where the beneficiary did not have probable cause to contest the will on the basis of undue influence. The testator’s children alleged undue influence. *Id.* at 724. The court concluded that “[f]amily discord and strife, coupled with a less-than-favorable inheritance, do not constitute probable cause.” *Id.* at 727. The court found that the ninety-one-year-old testator was “fully capable of executing testamentary documents. He maintained his independence, was freely permitted to come and go from his home and office as he desired, having opportunities to visit relatives, friends, and business associates without supervision.” *Id.* at 728. The court concluded that the testator was in good physical and mental health up until his death. *Id.* at 727–28. Since the beneficiaries could not show probable cause, the penalty clause was held valid and enforceable. *Id.* at 728.

180. *Id.* at 1067 (citing *Schaeffer v. Chapman*, 861 P.2d 611, 614 (Ariz. 1993) (forfeiture clause in a contract)); RESTATEMENT (SECOND) OF PROP., *supra* note 176, § 9.1 reporter’s note 7; Claudia G. Catalano, Annotation, *What Constitutes Contest or Attempt to Defeat Will Within Provision Thereof Forfeiting Share of Contesting Beneficiary*, 3 A.L.R. 5TH 590, 611 (1992).

181. *Id.*

182. See discussion *infra* Part V.C.

common law. The first step in the analysis should be based on Louisiana decisions that determine whether the judicial action brought by the heir is a contest that triggers the penalty clause. The second step should consist of three subparts, incorporating the French approach of determining the validity of the underlying disposition, the examination of the validity of the penalty clause, and the common law determination of enforceability of the penalty, allowing for a good faith, probable cause exception.

A. Step One: Determining Whether the Lawsuit Is a Contest

If a Louisiana court is faced with a penalty clause, the first step should be to determine whether the lawsuit brought by the heir amounts to a contest. In answering this question, it is necessary to construe the language of the penalty clause to see whether the suit triggers the application of the penalty. The interpretation of a particular clause depends on “the nature and purpose of the beneficiary’s conduct and the attending circumstances, as well as the language of the condition.”¹⁸³

This first step of the analysis is well-settled in Louisiana:¹⁸⁴ it was applied as early as 1918 in *Succession of Rouse*¹⁸⁵ and as

183. See Browder, *supra* note 7, at 321.

184. This approach is also prevalent in the rest of the United States. See, e.g., David M. Swank, *No-Contest Clauses: Issues for Drafting and Litigating*, 29 COLO. LAW. 57, 58 (2000) (noting that examples of a suit that may not trigger the penalty clause are actions “to construe the document in question or . . . actions challenging a fiduciary’s administration of a trust or estate”). See generally Browder, *supra* note 7, at 320–27 (providing a discussion of cases where a lawsuit does not amount to a contest); Catalano, *supra* note 180 (producing a comprehensive review of the relevant law in different jurisdictions).

A recent decision by the Supreme Court of Alabama provides a prime example of the construction of a no-contest clause to determine whether the judicial action brought violated the clause and should result in forfeiture. *Harrison v. Morrow*, 977 So. 2d 457 (Ala. 2007). Two beneficiaries under the will at bar filed a suit, alleging that the signature of the testator was a forgery. *Id.* at 458. The lower court disagreed with the allegation and admitted the will to probate. *Id.* A third beneficiary then brought the action for the enforcement of the no-contest clause, demanding forfeiture of the original contestants’ bequest. *Id.* at 459. The supreme court noted that it was unnecessary to analyze the validity of the *in terrorem* provision because the lawsuit alleging forgery did not fall within the meaning of the penalty clause. *Id.* The court construed the language of the penalty clause to proscribe “only challenges to procedures for the distribution of specific bequests and percentages thereof,” while the lawsuit brought by the two beneficiaries only questioned the disposition of the estate. *Id.* at 462. In its analysis, the court relied on the principle that “equity abhors forfeiture” and emphasized the need to narrowly construe the no-contest clause. *Id.* at 460 (citing *Kershaw v. Kershaw*, 848 So. 2d 942 (Ala. 2002)).

185. 80 So. 229 (La. 1918).

recently as 2006 in *Succession of Scott*.¹⁸⁶ In *Rouse*, the children of the testator sued the succession and their step-mother for the settlement of the community formerly existing between the plaintiffs' father and mother.¹⁸⁷ The defendant-widow reconvened, seeking enforcement of the penalty clause in the will and alleging that the plaintiffs' petition amounted to an attack upon the will, which should result in forfeiture of their shares.¹⁸⁸ Since the suit was in essence a settlement of the decedent's community property with his deceased ex-wife, the Louisiana Supreme Court dismissed the step-mother's allegations, stating that "[t]his is not a suit to fix the rights of his heirs in the succession of [the decedent], or to contest the will of [the decedent], and the provision in that will has no application or effect here."¹⁸⁹ There was no need to further discuss the penalty clause.

Similarly, in the case of *Scott*, the First Circuit Court of Appeal interpreted a penalty clause that stated, "If any of the named legatees should contest any provision in this will, then the naming of that person in [the] will shall be struck and they shall not be considered to be a legatee."¹⁹⁰ The daughter, an income beneficiary of a trust created by the will, brought a petition for a declaratory judgment, asking the court to confirm that the *in terrorem* provision did not apply to her as she was not one of the "named beneficiaries" under the will.¹⁹¹ The court agreed with the petitioner, noting the difference between the legal status of a trust beneficiary and that of a legatee.¹⁹² Thus, the court granted a declaratory judgment in the daughter's favor, ruling that her future lawsuit would not amount to a contest so as to result in forfeiture.¹⁹³

In these cases, the threshold determination that a judicial action is not a contest eliminated the need to answer the difficult questions regarding the validity and enforceability of the penalty clause.¹⁹⁴ Conversely, presuming that every lawsuit is a contest would trigger the unnecessary analysis of a penalty provision that

186. 950 So. 2d 846, 847 (La. App. 1st Cir. 2006), *writ denied*, 948 So. 2d 176 (La. 2007).

187. *Rouse*, 80 So. 229.

188. *Id.* at 234.

189. *Id.*

190. *Scott*, 950 So. 2d at 847.

191. *Id.* at 848.

192. *Id.* at 849.

193. *Id.*

194. See also *Succession of Rosenthal*, 369 So. 2d 166 (La. App. 4th Cir. 1979) (concluding that a suit for improper estate administration did not amount to a contest).

by its terms may not be applicable to the particular suit. Some commentators are in favor of the latter approach—the broad reading of the penalty clauses—because penalty clauses prevent litigation over the testator's estate and increase the chance that the testator's intent is upheld.¹⁹⁵ However, actions like the one brought by the children for the settlement of the community in *Rouse* or the suit filed by the heir in *Rosenthal* challenging the improper estate administration are not lawsuits of the type testators try to forestall. In fact, a suit meant to prevent the squandering of the estate by the executrix would likely be welcomed by the testator. Such actions facilitate the disposition of the estate according to the testator's wishes. In addition, proponents of broad construction of penalty clauses argue that narrow interpretation may create a flood of vexatious and frivolous litigation.¹⁹⁶ This fear is unfounded because the Louisiana Code of Civil Procedure includes devices that preclude worthless claims from being tried on the merits.¹⁹⁷ Most of such claims are disposed of through pre-trial exceptions or motions.¹⁹⁸

Accordingly, when construing the language of the clause, Louisiana courts have concentrated on the intent of the testator while also keeping in mind the interests of the beneficiary,¹⁹⁹ and they should continue to do so. If the court initially determines that the judicial action brought is not a contest within the meaning of the penalty clause, the court need not determine the validity and enforceability of the clause, and the analysis ends there. If, however, the lawsuit is the exact kind that the testator had in mind, the court should proceed to ascertain the validity and enforceability of the penalty clause.

195. See Begleiter, *supra* note 2, at 630 (arguing that “the courts should abandon the strict construction of no contest clauses”).

196. *Id.* at 634 n.38 (citing *Donegan v. Wade*, 70 Ala. 501, 504 (Ala. 1881); *In re Estate of Hite*, 101 P. 443, 444 (Cal. 1909); *Barry v. Am. Sec. & Trust Co.*, 135 F.2d 470, 473 (D.C. Cir. 1943)).

197. See, e.g., LA. CODE CIV. PROC. art. 921 (2008) (defining exceptions as “a means of defense, other than a denial or avoidance of the demand, used by the defendant, whether in the principal or an incidental action, to retard, dismiss, or defeat the demand brought against him”). See generally FRANK L. MARAIST & HARRY T. LEMMON, CIVIL PROCEDURE § 6.4, in 1 LOUISIANA CIVIL LAW TREATISE 145–50 (2d ed. 2008) (providing a comprehensive account of various exceptions).

198. MARAIST & LEMMON, *supra* note 197, § 6.4 and cases cited therein. The only case dealing with a penalty clause that was dismissed for failure to state a cause of action is *Gardiner*, 366 So. 2d 1065, 1069 (La. App. 3d Cir. 1979), *writ denied*, 369 So. 2d 154 (La. 1979); see discussion of *Gardiner* *supra* Part III.D.

199. Succession of Wagner, 431 So. 2d 10, 12 (La. App. 4th Cir. 1983); *Gardiner*, 366 So. 2d at 1069 (underscoring the need to ascertain the testator's intent).

To illustrate this step in the analysis, suppose that Bob's daughter Debbie sues to annul the will, claiming that Abby unduly influenced her father. After Abby files her reconventional demand asking the court to enforce the penalty clause against Debbie, the court should first look at the face of the clause to determine whether Debbie's suit is within its scope. The clause in this case forewarns that the beneficiary will forfeit her share if she in any manner whatsoever contests or attacks the will. Debbie's suit seeks to annul the will based on the circumstances surrounding its amendment. Thus, her judicial action will be tantamount to a contest or an attack on the will, as contemplated by the penalty clause. Once the court finds that Debbie's suit is a contest under the penalty clause, then the court will proceed to analyze the validity and enforceability of the clause.

B. Second Step: Validity and Enforceability

After the court determines that the lawsuit is a contest, the second step in the analysis should incorporate the traditional civilian examination of the underlying disposition and the common law inquiry of whether the contest was brought in good faith and for probable cause. The second stage of the analysis should focus on three subparts: (1) the validity of the underlying disposition, (2) the validity of the penalty clause, and (3) the enforceability of the penalty clause.²⁰⁰

1. Validity of the Underlying Disposition

To determine the validity of the underlying disposition, the court should use the traditional French determination of whether the disposition itself violates the law or public order.²⁰¹ The person contesting the will has to establish the invalidity by a preponderance of the evidence.²⁰² If the contestant can show that the underlying disposition is contrary to the law or public morals, then the penalty provision becomes illicit or immoral and should be deemed unwritten, as mandated by article 1519.²⁰³

Hence, at this stage of the analysis, Debbie would attempt to prove that her father's assistant, Abby, exerted undue influence upon Bob and that consequently his will is invalid. If Debbie succeeds, Louisiana courts should follow the example of their

200. See discussion *supra* Part III.E.

201. See discussion *supra* Part II.B.

202. See Swank, *supra* note 184, at 58.

203. LA. CIV. CODE art. 1519 (2008).

French counterparts and end the inquiry there. The penalty clause will be considered unwritten, and Debbie will not be penalized by forfeiture.

2. *Validity of the Penalty Clause*

Conversely, if Debbie fails to meet her burden of proof and the court concludes that the underlying disposition contains nothing contrary to the law or public order, the court should then examine the effect of the penalty provision. Sweeping provisions are more likely to be considered invalid as against public order.²⁰⁴ For instance, if the penalty clause threatens forfeiture by *all* heirs, should *any* of them contest, the court should follow *Kern* to invalidate the overbroad penalty clause.²⁰⁵ Once again, under these circumstances, the penalty clause will be deemed unwritten under article 1519, and Debbie will not be penalized.²⁰⁶

3. *Enforceability of the Penalty Clause and the Good Faith, Probable Cause Exception*

The most difficult question arises if both the underlying disposition and the penalty clause proper are valid.²⁰⁷ Although it is important to enforce the testator's intent, the contesting heir may have had reason to believe, at the time of contest, that the will was defective. Thus, even if the penalty clause and the underlying disposition are found to be valid by the court, the penalty clause should not always be enforceable. The common law good faith, probable cause inquiry appears most suitable for Louisiana analysis. Just as medieval England at some point combined common law and civilian analyses of no-contest clauses, so can contemporary Louisiana.²⁰⁸

The judicial adoption of common law principles does not violate the civilian mandate of legislative supremacy. The broad terms of article 1519 do not provide specific guidance for the courts' analysis of penalty clauses, thus leaving it to the discretion

204. See discussion of *Succession of Kern* *supra* Part III.C.

205. *Succession of Kern*, 252 So. 2d 507 (La. App. 4th Cir. 1971), *writ refused*, 254 So. 2d 462 (La. 1971).

206. Another example of an invalid penalty clause would be a provision that requires that the estate be destroyed. See discussion *supra* Part III.E.

207. See discussion *supra* Part III.E.

208. See HENRY SUMNER MAINE, *ANCIENT LAW* 144 (1986) (discussing the civil law origins of ecclesiastical courts and common law roots of courts of chancery).

of the judges.²⁰⁹ “When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.”²¹⁰ In applying article 1519, the courts have broad discretion substantively (in determining whether a particular provision is against the law or public policy) and procedurally (in establishing a consistent analytical framework).

The exception for good faith, probable cause contests adds another angle to the analysis of penalty provisions, taking into consideration the position of the beneficiary and eliminating the severity of the French doctrine. This approach is consistent with Louisiana’s civilian heritage as it encompasses the principle of good faith that is prevalent throughout the Civil Code.²¹¹ The best approach is to analyze both the objective and subjective aspects of the contest.²¹² Accordingly, once a court establishes that the penalty clause is valid, the burden is on the claimant to show “the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that

209. LA. CIV. CODE art. 1519 (2008).

210. LA. CIV. CODE art. 4 (2008). The broad language of the article could be an example of delegation to the judge of legislative authority. *See generally* James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 13 (1993) (noting that “use of indeterminate words which demand appraisal of values, such as ‘fault,’ ‘good faith,’ ‘public order,’ or ‘public policy’” calls for judicial “rulemaking”).

211. *See, e.g.*, LA. CIV. CODE art. 518 (2008); LA. CIV. CODE art. 1759 (2008); LA. CIV. CODE art. 1770 (2008); LA. CIV. CODE art. 1975 (2008); LA. CIV. CODE art. 1983 (2008); LA. CIV. CODE art. 1996 (2008); LA. CIV. CODE art. 2021 (2008); LA. CIV. CODE art. 2035 (2008) (providing examples of good faith in various parts of the Civil Code). *See generally* Saul Litvinoff, *Good Faith*, 71 TUL. L. REV. 1645 (1997) (discussing the concept of good faith as it is used in the Civil Code).

212. Another way to achieve an equitable outcome and yet avoid the importation of the common law concept of “probable cause” into Louisiana successions is to define “good faith” to contain both objective and subjective elements, similar to Civil Code article 3480 dealing with good faith acquisitive prescription. “For purposes of acquisitive prescription, a possessor is in good faith when he reasonably believes, in light of objective considerations, that he is owner of the thing he possesses.” LA. CIV. CODE art. 3480 (2008). Substantively, the result would be the same as when the common law terminology is applied. However, the author believes that the adoption of the common law good faith, probable cause analysis will foster uniformity with other jurisdictions and permit Louisiana practitioners and judges to seek guidance in the abundant case law of other states.

the contest or attack will be successful.”²¹³ In evaluating the objective and subjective factors, the courts engage in “a balance between allowing a testator to discourage pesky contestants and providing an avenue for legitimate contests where fraud, undue influence or forgery seem likely.”²¹⁴ The courts should look at the contest as a spectrum of potential scenarios: the more serious and public-policy implicating the allegation, the less showing should be required by the beneficiary.²¹⁵

For example, if the factual scenario naturally gives rise to a suspicion of undue influence, as in the case of Bob’s will, the very existence of the circumstances may suffice to shield the beneficiary from forfeiture imposed by the penalty clause.²¹⁶ However, if the interest alleged by the beneficiary is purely pecuniary (i.e., a claim that the heir did not get as much as she felt entitled to receive), the factual showing of objective and subjective factors becomes necessary. For instance, assume that Abby, Bob’s assistant, does not exist, and there is no suspicion of undue influence. If the only reason Debbie attacks her father’s will is to receive a bigger share, Debbie will have to prove that there was a substantial likelihood that her claim was meritorious at the time she brought it before the court. In the absence of allegations that implicate public interest—such as fraud, forgery, or undue influence—there is no societal policy to support Debbie in her quest for more money than what her father bequeathed to her. In showing the existence of a substantial likelihood of success, Debbie will need to prove both the objective and subjective elements. To demonstrate her subjective state of mind, Debbie could offer her testimony and other circumstantial evidence of the existence of good faith on her part. Nevertheless, it is hard to imagine that she could show the existence of objective probable cause. She would need to prove by a preponderance of the evidence that a reasonable person would believe in the success of the action. Because this is a very stringent standard, Debbie is unlikely to be eligible for the exception and will almost certainly forfeit her bequest.

213. *In re Estate of Shumway*, 9 P.3d 1062, 1066 (Ariz. 2000) (citing RESTATEMENT (SECOND) OF PROP., *supra* note 176, § 9.1 cmt. j) (emphasis omitted); *see also* Swank, *supra* note 184, at 58.

214. Guglielmo, *supra* note 168, at 21 (citations omitted).

215. *Shumway*, 9 P.3d at 1066 (citing RESTATEMENT (SECOND) OF PROP., *supra* note 176, § 9.1 cmt. j) (“The evidence needed . . . should be less where there is strong public policy supporting the legal ground of the contest or attack”) (emphasis omitted).

216. *See supra* Introduction.

Some courts and commentators have suggested that good faith, probable cause exceptions should not be allowed and that penalty clauses should be considered “valid and enforceable without qualification.”²¹⁷ One reason offered is that good faith and probable cause are inherently difficult to define.²¹⁸ Although this may be true, the exception provides a flexible solution for the difficult task of balancing policy considerations. What is fair in one case may not be fair as applied to the next scenario. The good faith, probable cause exception affords the courts the necessary discretion for handling a wide variety of wills and their contests.

Another argument against allowing leeway for good faith, probable cause contests is that penalty clauses are “good law and good morals,” as noted by the United States Supreme Court.²¹⁹ Penalty clauses may “discourage vexatious or unfounded litigation, the family quarrels frequently attending proceedings of this type, and the wasting of the testator’s estate, or the defaming of his reputation in protracted litigation over his will”²²⁰ However, there is no basis to conclusively state that penalty clauses prevent litigation. In fact, the insertion of a penalty clause at times may result in doubling the litigation. For example, the *Scott* case was based on the petition by the testator’s daughter for a declaratory judgment “seeking a declaration that she was not subject to the *in terrorem* clause in her father’s will because she was not one of the ‘named legatees.’”²²¹ The court granted the judgment in favor of the daughter, which allowed her to bring the second action regarding the will.²²²

217. See Browder, *supra* note 7, at 328 (discussing decisions that take this approach).

218. Brown, *supra* note 6, at 427 (“The difficulty of determining exactly what is probable cause for litigation will render it possibly ineffective, and certainly unsatisfactory, since it tends away from a fixed standard and renders the law uncertain.”). For an argument that the good faith, probable cause exception is inadequate in the context of penalty clauses, see Begleiter, *supra* note 2, at 648 (pointing out the difficulty in defining “good faith” and “probable cause” and noting that “[w]hen the testator makes his intent clear . . . the testator’s intent should be effectuated”).

219. *Smithsonian Inst. v. Meech*, 169 U.S. 398, 415 (1898) (noting that will contests can bring “to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial; and, as a result, the manifest intention of the testator is thwarted”); see also Domskey, *supra* note 172, at 495 (discussing arguments in favor of penalty clauses).

220. Browder, *supra* note 7, at 328.

221. *In re Succession of Scott*, 950 So. 2d 846, 848 (La. App. 1st Cir. 2006), writ denied, 948 So. 2d 176 (La. 2007); see discussion *supra* Part V.A.

222. *Scott*, 950 So. 2d at 849.

Furthermore, not allowing an exception for good faith, probable cause contests discourages heirs from bringing meritorious actions. A penalty clause may serve as a shield "in the hands of a wrongdoer who is named a beneficiary in a will through fraud or undue influence."²²³ The diligent heir—like Debbie—who has a legitimate claim may be deprived of her day in court.²²⁴ Although there are strong policy reasons for upholding the wishes of the testator and preventing unnecessary litigation, equally persuasive policy dictates that wills established through forgery, fraud, or undue influence should not be enforced. As noted by the Supreme Court of South Carolina:

If a devisee should accept the fruits of the crime of forgery, under the belief, and upon probable cause, that it was forgery he would thereby become morally a *particeps criminis*; and yet if he is unwilling to commit this moral crime, he is confronted with the alternative of doing so, or of taking the risk of losing all, under the will, in case it should be found not to be a forgery.²²⁵

Because penalty clauses implicate countervailing policy considerations, it should be up to the courts to decide on a case-by-case basis whether to enforce the penalty clause.

Consequently, the good faith, probable cause exception provides a practical solution to the current gap in Louisiana law regarding the analysis of enforceability of penalty clauses as applied to heirs attacking the will for reasons of public order. In the absence of public policy considerations, the exception imposes a stringent burden of proof on the contestant. Because the analysis is flexible, it leaves much leeway for the courts to balance the policy considerations on both sides—the testator's intent versus the rights of the heir—so as to achieve a fair result.

VI. CONCLUSION

This Comment has attempted to glean general principles from Louisiana jurisprudence and offer an equitable solution that will

223. Domskey, *supra* note 172, at 495.

224. See generally Begleiter, *supra* note 2, *passim* (providing a detailed discussion of policy considerations involved in the analysis of *in terrorem* provisions). An essential part of the American legal system is the freedom of access to courts. See, e.g., LA. CONST. art. I, § 22 ("All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.").

225. Rouse v. Branch, 74 S.E. 133, 135 (S.C. 1912).

fill the gaps in Louisiana courts' analysis of penalty clauses. In scrutinizing penalty clauses, Louisiana courts should follow a two-step approach: (1) construe the penalty clause to determine whether the judicial action brought is a contest within the meaning of the clause; and (2) establish the validity and enforceability of the disposition and the penalty provision. Incorporation of the common law good faith, probable cause exception into the second part of this analysis alleviates the fear of forfeiture for the earnest beneficiary who has well-founded concerns about the validity of the will. Adherence to the proposed two-step approach not only resolves the substantive question of the validity and enforceability of no-contest clauses, but also formalizes the courts' analysis, thus providing more predictability for the testator and the estate planner.

Knowing how courts interpret *in terrorem* provisions will influence the practitioners' advice to their clients in choosing the right estate-planning strategy. It is a natural desire of all testators that their will is enforced according to their intentions. Thus, "[i]n an increasingly litigious environment, many estate planning clients are seeking ways to prevent their estate plan from being challenged or contested."²²⁶ Due to the current uncertain status of *in terrorem* provisions in Louisiana, practitioners should advise their clients of other methods of ensuring that their estates will be distributed according to their wishes. The following tactics may reduce the risk of litigation: advising heirs of inheritance plans, using revocable and irrevocable trusts instead of wills, using mediation or arbitration clauses, or using other conditional donations.²²⁷ However, if the testator is adamant about inserting an *in terrorem* provision in the will, during its drafting practitioners should bear in mind the potential interpretation of the penalty clause. Because courts tend to construe penalty provisions strictly, practitioners must be precise in their drafting.²²⁸ For example, the penalty clause should specifically list what actions by the heir are to be considered a contest of the will.²²⁹ The clause should also clarify when forfeiture is to take effect: upon the filing of the suit or after

226. Swank, *supra* note 184, at 57.

227. Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, in Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 237, 248–65 (2008).

228. Swank, *supra* note 184, at 59. *But see* Begleiter, *supra* note 2, at 675 (arguing that the clauses should be drafted as broadly as possible so that there is less likelihood the court will forego applying the clause by concluding that the action brought is not a contest).

229. Begleiter, *supra* note 2, at 675; *see also* Domskey, *supra* note 172, at 504.

proceedings begin.²³⁰ Additionally, if potential heirs do not receive any legacy under the will, their motivation to contest increases because they have nothing to lose.²³¹ To reduce the probability of a contest by a particular individual, the testator should include a small bequest for the individual and insert a penalty clause, hoping that the beneficiary will have an incentive not to contest the will.²³² To increase the chance of the enforcement of the penalty clause, the testator should specify that in case of forfeiture the bequest should go to some charitable organization or another party who would then have an interest in bringing the action for the enforcement.²³³

Until Louisiana courts adopt the framework suggested herein, heirs like Debbie who seek to contest a will with a penalty clause have no guarantees. In the meantime, Debbie will be forced to decide whether contesting the testament over twenty-five percent of her father's estate is worth the risk of forfeiting the seventy-five percent that she received. Debbie can merely hope that the court will creatively forgo the penalty. Without the suggested framework, uncertainty reigns for testators like Bob who, based on the inconsistent analysis of penalty clauses thus far, execute testamentary provisions not knowing whether their last wishes will be honored. The proposed framework would solve both problems by providing the courts with a standard that leaves room for an equitable, case-by-case resolution.

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230. Domskey, *supra* note 172, at 504–05.

231. Swank, *supra* note 184, at 59. Also, if the potential contestant would inherit by intestacy, the testator should consider bequeathing him slightly more than his intestate share.

232. *Id.*

233. Domskey, *supra* note 172, at 505.

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